Supreme Court, U.S.
FILED

No. 09-565

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IN THE

Supreme Court of the United States

LANISE BASON,

Petitioner,

v.

JOAN N. YUKINS,
Warden, Robert Scott Correctional Facility,
Plymouth, Michigan,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

JEREMY C. BATES
Counsel of Record
21 West Street, Apt. 21J
New York, New York 10006
(212) 204-6599

MARK U. SCHNEIDERMAN
MATTHEW LIPPERT
125 Broad Street, 32nd Floor
New York, New York 10004
(212) 558-4000

Counsel for Petitioner

November 5, 2009

Questions Presented

When Lanise Bason saw her abusive husband walking to a meeting with his mistress, she ran him over with her car and killed him. At trial, however, her counsel failed to submit timely an expert report on battered-woman syndrome. In her Michigan appeal, Ms. Bason claimed that counsel had been ineffective for not advancing heat-of-passion and battered-woman theories. But she did not allege the specific failure to put the expert report in on time.

The questions presented therefore are:

1. Is the test for factual exhaustion of a habeas claim, as some appellate cases hold, whether the petitioner alleged the same specific fact in State court; or is it, as this Court has held, whether a new fact supplements the State-court claim without fundamentally altering it?

2. On detecting a new claim, may a court of appeals overlook an express waiver of exhaustion, and invoke default *sua sponte*, without giving petitioner notice and an opportunity to respond—thus taking the minority views in two circuit splits?

3. Here, did the Michigan court misapply *Strickland* by using a substantial-defense test, misapply *Wiggins* by deferring to "strategy," unreasonably determine facts as to heat of passion, and unreasonably determine that the abandonment of both defense theories was a "strategic decision"?

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Lanise Bason prays that the Supreme Court grant a writ of certiorari to review the judgment below of the Court of Appeals for the Sixth Circuit.

Opinions Below

The Sixth Circuit's opinion, App. 3a–5a, is reported at 328 F. App'x 323. The district court's opinion, App. 9a–27a, is unreported but is available at 2005 WL 1529726.

The Michigan Supreme Court's denial of review, App. 28a–29a, is reported at 468 Mich. 905, 661 N.W.2d 581. The opinion of the Michigan Court of Appeals, App. 30a–38a, is unreported but is available at 2002 WL 31012614.

Jurisdiction

The court of appeals entered judgment on May 12, 2009. A timely petition for rehearing was denied on August 7, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

The Sixth Amendment requires that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

The Fifth Amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V. The Fourteenth Amendment provides: "No State shall . . . deprive any person of life,

liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), provides:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> . . .
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT

Lanise Bason has languished behind bars since 2000, when the State of Michigan convicted her of murder. Against that charge, Ms. Bason had two defense theories, but neither was put forward at trial. The State courts held that defense counsel

had made a "strategic" decision to abandon both theories. In the Sixth Circuit, however, Ms. Bason pointed to transcript evidence showing otherwise.

The court of appeals avoided this evidence by raising procedural defenses *sua sponte*. In so doing, the court took sides in a conflict in principle over how to determine whether a habeas claim is factually exhausted. The Sixth Circuit also took sides in two circuit splits—over whether waiving exhaustion waives a related procedural default, and over whether courts may raise procedural defenses *sua sponte*, without providing notice or an opportunity to be heard. To clarify the law on these matters, this Court should grant certiorari.

A. Ms. Bason Killed Her Abusive Husband When She Saw That He Was About To Commit Adultery.

When Lanise Bason was 14 years old, she fell in love with the wrong man: Bryant Branch. In 1995, she married him.

Mr. Branch was a philanderer. He fathered ten children—eight of them by women other than his wife. Ms. Bason knew her husband was unfaithful to her, and that he was having an affair with a woman named Wynter White.

Mr. Branch lived a life of drugs and alcohol and criminal behavior. He was shot, he shot his sister's boyfriend, and he was said to have "beat[en] a murder case." In June 1998, Ms. Bason applied for a protective order against her husband. In the application, she stated, "[M]y husband has been

abusive & violent[.] [H]e has beat me up several times[.] I am very scared of him."

On February 12, 1999, Ms. Bason filed for divorce. Ten days later, Mr. Branch beat his wife and gave her a black eye. The next morning, the couple resumed arguing after Mr. Branch phoned another woman. Mr. Branch then left Ms. Bason's house on foot.

Ms. Bason got into her car to find her husband. As it happened, he was walking to a house where, as she knew, he had often seen Wynter White. When Ms. Bason saw her husband walking toward his trysting place, she accelerated. Her car jumped a curb, traversed several lawns, and struck Mr. Branch, who was killed.

Ms. Bason suffered serious injuries and was in a coma for days. While she was on medication and without counsel, the police took a statement. She was then arrested.

The arraigning judge found "mitigating circumstances" and bound over "on murder two subject to any heat of passion." The court said, "I believe that she was suffering under the heat of passion." App. 112a. Ms. Bason pled not guilty.

B. Counsel Failed To Produce Timely a Forensic Psychologist's Report on Battered-Woman Syndrome.

Ms. Bason's lawyer, Wendy Barnwell, told Judge Vera Massey Jones that the defense would call eight witnesses. One would be a psychologist, Dr. Firoza Van Horn. The court appointed Dr. Van

Horn to render her opinion as to state of mind, and the defense witness list included her as a "Forensic Psychologist (Battered Woman Syndrome)."

But on April 17, 2000—the day of trial—the prosecutor said that she had received Dr. Van Horn's report only that morning. App. 121a. The court then said, "It wasn't turned over correctly. I'm not going to allow it to be used." App. 128a.[1]

Barnwell objected to this ruling. *Id.* She explained, "Your Honor, with respect to my client's health, her mental status . . . , that's a crucial part of our defense, and I think it would highly prejudice her." App. 129a. This objection was overruled, and the bench trial began. App. 129a–30a.

The State predicted that it would show that Ms. Bason "had the intent to kill, or the intent to cause great bodily harm," or "willful and wanton disregard" for her actions. Barnwell responded, "[T]hey will not be able to prove her state of mind." App. 116a. Barnwell said her client "was a battered woman," referred to the protective order, and predicted that witnesses would testify to "abuse," "hitting around," and "beating up" of Ms. Bason by her husband. App. 116a–18a. Barnwell also described the love triangle among Ms. Bason, Mr. Branch, and Wynter White, and said that when Ms. Bason saw her husband

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[1] The transcript does not specify, and we are not admitted in Michigan, but late production of the report appears to have violated that State's evidentiary rules. *See* Mich. R. Crim. P. 6.201 (discovery); Mich. R. Evid. 706 (appointed experts).

walking to his trysting place, she was "provoked and in hot blood." App. 116a–18a, 118a.

The State called 16 witnesses--police officers, neighbors, and Ms. White. Together they established that Ms. Bason had driven at least 40 miles an hour, for 100 feet in a straight line, and killed her husband.

Then the State tried to bring the statement in. So the court held a *Walker* suppression hearing. The defense called four witnesses, including Dr. Van Horn. But the only clue that they were *Walker* witnesses, not trial witnesses, was this:

> THE COURT: A Walker hearing?
> MS. BARNWELL: Yes, your Honor.
> THE COURT: All right, let's go.
> [PROSECUTOR]: Right, not the trial.
> THE COURT: Not the trial.
> [PROSECUTOR]: Correct.
> MS. BARNWELL: Yes, your Honor.

JA 738. Before testifying that Ms. Bason had been on codeine while the police took the statement (whereupon Judge Jones suppressed it), Dr. Van Horn also testified that Ms. Bason had been "abused for many years" by her husband. JA 908.

Six weeks after trial began, the State rested. Barnwell then failed to move for a directed verdict, and rested as well. JA 975. These events took place—or failed to take place—in rapid succession:

> [PROSECUTOR]: Your Honor, the People would rest at this time.

> THE COURT: Does Defense wish to put in any evidence?
> MS. BARNWELL: Your Honor, I've discussed this case with my client. . . . We talked about the possibility of not bringing on a case. After discussing this matter again today with my client, and her grandmother, and her pastor . . . we rest.

Barnwell closed by arguing that the State had not met its burden even "as to manslaughter." App. 132a. She said that "nothing ha[d] been proven." App. 133a. But nowhere in her closing statement did Barnwell mention "state of mind," "hot blood," "heat of passion," "self-defense," or "battered woman." App. 132a–34a.

The court found Ms. Bason guilty of murder. App. 138a. At sentencing, the court noted that "there was no showing of any mental problem or anything else" on which to base a reduction. So Judge Jones sentenced Ms. Bason to 18 to 50 years.

C. The Trial Court: "I Have No Evidence" As to the "State of Mind of the Defendant."

Ms. Bason moved for additional findings regarding innocence and manslaughter. In considering this motion, Judge Jones said:

- "The problem is that there was no evidence . . . for voluntary manslaughter."
- "I didn't hear from any physician. I didn't hear from anybody who could have told me anything about an emotional excitement . . . . I have no evidence."

- "I heard Dr. Van Horn . . . in a Walker Hearing. . . . I do have the ability to put that out of my mind because that's all it was for, was for the Walker hearing."
- "[W]e never got around to the state of mind of the defendant at the time of the act."
- "I feel like I didn't hear a defense."

So Judge Jones held a hearing. At last Dr. Van Horn testified that in her expert opinion, Ms. Bason was "not criminally responsible" because she had been "abused physically." App. 145a. Then the State objected. *Id.* There ensued a six-minute, off-the-record colloquy, after which the court stated, "[T]here is a defense that could have been raised," and "I'm quite sure there's going to be a motion for ineffective assistance of counsel." App. 145a, 146a.

Indeed there was. At the motion hearing, Ms. Bason was represented by a new lawyer, George Corsetti. The only witness was Barnwell. Corsetti asked why Barnwell did not move for a directed verdict. She replied, "That's the first time I never did. I plain out forgot when [sic] I was." Corsetti also asked whether, when Barnwell rested, she realized that Dr. Van Horn's *Walker* testimony was not trial testimony. Barnwell said, "I should have taken a break." JA 1228. So Corsetti asked the question again, and Barnwell dodged it again. When asked whether Ms. Bason had known that *Walker* testimony was not for the trial, Barnwell answered, "I don't know." Barnwell did know that witnesses had been ready to testify to "fights,"

"violence," and "physical altercations" between Ms. Bason and her husband. JA 1231, 1240.

At the end of the ineffectiveness hearing, even the State admitted that "all of us, now that we've read the transcript and thought about this, would do things a little bit differently." JA 1260. But a motion for a new trial was denied.

D. The State Court of Appeals: The Failure To Present a Battered-Woman Theory Was "Strategic."

On appeal, Corsetti argued that Barnwell had failed to use a battered-woman theory. App. 94a–102a. But his brief did not mention the report.

The Michigan Court of Appeals noted that "there may have been evidence to support alternate defenses," but held that Ms. Bason had "failed to assert her right to such defenses or establish that those defenses were substantial." App. 38a. This was so, the court said, App. 34a, because

> the existing record does not establish that defendant honestly or reasonably believed she was in imminent danger of death or great bodily harm sufficient to establish a claim of self-defense. Nothing in the record shows that defendant killed Bryant because she feared for her life or that her state of mind was so affected by systematic and continual spousal abuse characteristic of the battered spouse syndrome that she feared some imminent harm by Bryant.

The State court held that even if Ms. Bason and her husband had argued after he phoned his mistress, there was cooling-off time between the call and the crash. App. 36a. As for Mr. Branch's adultery with Wynter White, the court described this as "the same situation [Ms. Bason] had been coping with for a lengthy period." *Id.*

Lastly, the court found that Barnwell "made a strategic decision to proceed on an accident theory and not to pursue the alternate theories." App. 37a. So the State appellate court affirmed. The Michigan Supreme Court denied review, although a dissenter would have remanded for a hearing on whether Barnwell had been ineffective. App. 29a.

E. The District Court: Counsel "Elected To Proceed" on an Accident Theory.

Ms. Bason's *pro se* federal petition included a broad ineffective-assistance claim. App. 82a, 67a. The petition alleged that "Heat of Passion . . . [was] not investigated" and that "Battered Spouse Syndrome was investigated but was not presented as a defense." App. 82a. An amendment alleged that Dr. Van Horn had arrived at a "conclusion" of battered-wife syndrome, App. 69a; that even so, Barnwell had failed to use the divorce complaint or the protective order, App. 70a; and that "Even for sentencing . . . counsel failed to use the expert witness," App. 71a. In sum, Ms. Bason alleged, "Counsel was ineffective for not presenting a defense or any mitigating evidence to support a lesser charge and a lenient sentence." App. 72a.

Ms. Bason moved that counsel be appointed. She also requested discovery, including "reports . . . by expert witnesses in regards to . . . Battered Wife Syndrome." These requests were denied.

In dismissing the petition, the district court quoted almost the entire Michigan Court of Appeals opinion. To it, the district court added the notion that a "failure to call witnesses . . . can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." App. 24a (quoting *Chegwidden* v. *Kapture*, 92 F. App'x 309, 311 (6th Cir. 2004) (unpublished) (which was quoting a Michigan court)). The district court held that Ms. Bason had not shown "that the other possible defenses were substantial or that any of those defenses would have altered the outcome at trial." App. 25a. So the court dismissed Ms. Bason's petition with prejudice. App. 27a. Later the district court did grant a certificate of appealability "as to Petitioner's ineffective assistance of counsel claim." App. 8a.

F. The Sixth Circuit: "We Decline To Consider" Counsel's Failure To Submit the Report.

On appeal, the State described Ms. Bason's claim as one that she had been denied effective assistance "through counsel's failure to present a defense" or "to advance defenses." The State also expressly conceded, by checking a box, that remedies had been exhausted. State Br. at ii (fact sheet). Contending that Ms. Bason had presented

her claim to the State courts, the State urged that AEDPA deference should apply. *Id.* at 2–5, 7, 8–9.

On January 24, 2008, Ms. Bason received the Van Horn report. She moved to supplement the record with it. At argument on February 1, 2008, the panel expressed concern that the district court had not seen the report. Other than this concern, the court did not ask about—and the State did not brief or argue—exhaustion or default.[2] Days later, the Sixth Circuit denied Ms. Bason's motion.[3]

Fifteen months later, the court of appeals handed down a 2.5-page, unpublished, *per curiam* decision. The decision divided Ms. Bason's claim into the following four "components," which the decision then denominated as "claims":

(1) "by failing to follow procedural rules, trial counsel caused the critical expert report to be excluded";

(2) "counsel 'forgot' to test the prosecution's case by moving for a directed verdict";

(3) "trial counsel failed to put on a case for the defense"; and

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[2] In the district court, the State purported to "assert[] any and all available defenses including failure to exhaust . . . and procedural default for each claim to which it is applicable." App. 50a. This formula cannot have preserved any issue, as it merely begged the question.

[3] Dr. Van Horn's report is therefore not in the Appendix. Ms. Bason is willing to lodge the report with the Clerk.

(4) "trial counsel also failed to present important mitigating evidence at sentencing."

App. 4a. As to the second and third "claims," the Sixth Circuit affirmed based on the district court's reasoning. App. 5a. The court "decline[d] to consider the merits of the first and fourth . . . claims," deeming them unexhausted and defaulted. *Id.*

REASONS FOR GRANTING THE WRIT

I.

Appellate Cases Disagree in Principle Over What Test Courts Should Use To Judge Whether a New Argument That Counsel Was Ineffective Raises a New Claim.

A federal court may grant habeas relief to a State prisoner if "it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). To exhaust, a petitioner must present, in State court, the "substantial equivalent" of the federal claim, *Picard* v. *Connor*, 404 U.S. 270, 278 (1971), so as to give the State "a 'fair opportunity' to apply controlling legal principles to the facts bearing upon" the claim, *Anderson* v. *Harless*, 459 U.S. 4, 6 (1982) (per curiam) (quoting and citing *Picard*, 404 U.S. at 276–77). The State petition "must include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief"—or, in other words, "the facts

necessary to state a claim." *Gray* v. *Netherland*, 518 U.S. 152, 162–63 (1996).

"[T]here are instances," however, "in which the ultimate question . . . will be the same despite variations in . . . factual allegations urged in its support." *Picard*, 404 U.S. at 277. Notably, a petitioner may present new evidentiary affidavits in federal court, if this "supplemental evidence" does not "fundamentally alter the legal claim already considered by the state courts. . . ." *Vasquez* v. *Hillery*, 474 U.S. 254, 260 (1986).

This exhaustion jurisprudence, according to one treatise, has "not added much by way of workable guidelines." 17B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, VIKRAM DAVID AMAR, FEDERAL PRACTICE & PROCEDURE § 4264.3 (Thomson 3d ed. 2007). Federal courts "have done their best to apply the generalities announced in the Supreme Court decisions" to a variety of specific situations. *Id.* But confusion and disagreement have arisen. Indeed, some courts of appeals have espoused two or three standards. As a result, the leading habeas treatise can only describe what the law of factual exhaustion "seems to be." 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 23.3c(ii) (LexisNexis 5th ed. 2005).

A. Abiding by *Vasquez*, Some Cases Permit Factual Arguments That Supplement, but Do Not Fundamentally Alter, State Claims.

The Sixth Circuit, which failed to mention *Vasquez* here, has relied on it heavily elsewhere:

> The purportedly new evidence of [a second plea] offer does not "fundamentally alter" the claim that [counsel] failed to relay a favorable plea offer that [petitioner] would have accepted, as it would fit comfortably within the rule that "[u]nder *Vasquez* and allied decisions, the petitioner may supplement and clarify the record, *inter alia*, through . . . introduction of new factual materials supportive of those already in the record [or] presentation of additional instances of the same alleged violation."

Satterlee v. *Wolfenbarger*, 453 F.3d 362, 366 n.2 (6th Cir. 2006) (quoting 2 HERTZ & LIEBMAN, FEDERAL HABEAS PRACTICE § 23.3c, at 1088–89). Under this rule, after a petitioner argued in State court that counsel had identified a defense expert who agreed with the prosecution, and so testified at trial, then in federal court the petitioner could "marshal[ ] new facts to support his claim" that counsel had been "ineffective in handling the scientific evidence." *Richey* v. *Bradshaw*, 498 F.3d 344, 352, 353 (6th Cir. 2007). The "legal basis" of the claim "remained constant," and the new facts "merely substantiate[d] it." *Id.* at 353. Similarly, two claims—that a witness on battered-woman syndrome was improperly denied (for State eviden-

tiary reasons) and that counsel was ineffective in failing to consult such an expert—can be so "inherently intertwined" that a petitioner presents the one by presenting the other. *Dando* v. *Yukins*, 461 F.3d 791, 797 (6th Cir. 2006).

The Seventh Circuit likewise has considered state-of-mind evidence not presented to State courts. When a petitioner consistently asserted in State court that trial counsel had been ineffective for failing to present a defense of post-traumatic stress disorder, his new argument to this effect in federal court, based on the transcript of his juvenile hearing, did not "change the substance" of the argument, but "merely supplie[d] an additional piece of evidence. . . ." *Boyko* v. *Price*, 259 F.3d 781, 789 (7th Cir. 2001).

Recognizing confusion among the circuits, the Fifth Circuit has held that if a petitioner's State brief argued that counsel should have interviewed a named eyewitness, the petitioner had raised the issue sufficiently, so that the witness's affidavit, introduced in federal court, did not alter the claim. *Anderson* v. *Johnson*, 338 F.3d 382, 388 (5th Cir. 2003). This result, the court noted, was "contrary" to holdings of other circuits on "somewhat analogous (but distinguishable) facts." *Id.* at 389 n.26 (saying "we abide by . . . *Vasquez*.").

The issue in *Vela* v. *Estelle*, 708 F.2d 954 (5th Cir. 1983), *cert. denied*, 464 U.S. 1053 (1984), was similar to that here—how should a court treat ineffectiveness allegations that "were not explicitly enumerated," 708 F.2d at 958, in State court? The

Fifth Circuit noted that "counsel's performance is to be evaluated on the basis of the *totality* of the circumstances in the entire record" and that "*all* the instances of ineffective assistance . . . were contained in the trial record reviewed by the state habeas court. . . ." *Id.* at 959 (italics original, internal quotation marks omitted). The allegedly new facts, therefore, were "not new at all," and the court considered them. *Id.* at 960. *Vela* seems to remain Fifth Circuit law where, as here, a habeas petitioner raises a broad ineffective-assistance claim and the State court has assessed that claim by reviewing the entire record. *See Ries* v. *Quarterman*, 522 F.3d 517, 526 n.4 (5th Cir. 2008) (distinguishing claim in *Vela* as "broad").[4]

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[4] A treatise endorses the *Vela* approach:

> Particularly in cases in which the proper analysis of the petitioner's legal claim demands that particular allegations of error be judged against the totality of circumstances at trial, and certainly if it appears that the state courts examined the full record in that light, a federal habeas court can properly conclude that the exhaustion doctrine is satisfied. Factual matters appearing in the record, and simply spotlighted with greater care in a prisoner's federal petition or brief, are not, in truth, *new* at all.

POSTCONVICTION REMEDIES § 5.10 (West 2009) (italics original); *see also id.* n.53. To similar effect is *Peoples* v. *United States*, 403 F.3d 844 847–48 (2005) (Easterbrook, J.) ("[I]neffective assistance of counsel is a single ground for relief no matter how many failings the lawyer may have displayed. Counsel's work must be assessed as a whole; it is the overall deficient performance, rather than a specific failing, that constitutes the ground of relief."); *see also*

B. Other Cases Use a Specific-Allegation Test, or Ask Whether Petitioner's Federal Argument Is "More Specific and Powerful."

In apparent tension with both *Vasquez* and *Boyko*, however, many Seventh Circuit cases require petitioners to have identified, in State court, "the specific acts or omissions of counsel" alleged to be violative. *Johnson* v. *Hulett*, 574 F.3d 428, 432 (7th Cir. 2009); *accord Pole* v. *Randolph*, 570 F.3d 922, 935 (7th Cir. 2009) (requiring petitioner to have raised in State court "particular factual basis" for federal claim); *Momient-El* v. *DeTella*, 118 F.3d 535, 541 (7th Cir. 1997) (asking if petitioner identified in State court "the specific acts or omissions of counsel that form the basis for his claim of ineffective assistance") (internal quotation marks omitted).

Hence a "failure to alert the state court to a complaint about one aspect of counsel's assistance" may lead to default. *Stevens* v. *McBride*, 489 F.3d 883, 894 (7th Cir. 2007). The Eleventh Circuit has stated the rule similarly: "[P]etitioners may not present particular factual instances of ineffective assistance of counsel in their federal petitions that were not first presented to the state courts." *Kelley* v. *Sec'y, Dep't of Corr.*, 377 F.3d 1317, 1344 (11th Cir. 2004) (collecting cases).

Thompson v. *Battaglia*, 458 F.3d 614, 616 (7th Cir. 2006) (Wood, J.) (extending *Peoples* to reach two factual arguments that the petitioner had not raised in State court).

Courts also ask whether a federal argument places the claim "in a significantly different and stronger evidentiary posture than it was when the state courts considered it." *Brown* v. *Estelle*, 701 F.2d 494, 495 (5th Cir. 1983) (per curiam). The leading case to ask this is *Demarest* v. *Price*, 130 F.3d 922 (10th Cir. 1997). There, the petitioner had alleged in State court that counsel had failed to challenge or cross-examine the prosecution's blood-spatter experts. *Id.* at 937. At a federal hearing, however, expert blood-spatter testimony for the defense "transformed" the petitioner's claim "from one involving only general allegations of failing to investigate and cross-examine and only a minimal showing of prejudice into one involving a concrete reference to a qualified expert who could have been produced at trial to rebut the scientific basis of the state's case." *Id.* at 938.

The Fifth Circuit has phrased the test as a materiality standard. *Kunkle* v. *Dretke*, 352 F.3d 980, 988 (5th Cir. 2003). But even under that standard, the Fifth Circuit has considered expert affidavits, not presented to State courts, supporting a claim that counsel had failed to investigate mental-health defenses. *Dowthitt* v. *Johnson*, 230 F.3d 733, 744–46 (5th Cir. 2000). The court asked whether the affidavits put the claim "in a significantly different and stronger evidentiary posture," but found that they "added little." *Id.* at 746 (internal quotation marks omitted).

The difference between a stronger-posture test and *Vasquez* is evident in *Conner* v. *Quarter-*

man, 477 F.3d 287 (5th Cir. 2007). There, the petitioner sought to use new medical records:

> Even if the medical records put Conner's claim in a "stronger evidentiary posture," *Anderson*, 338 F.3d at 388 (citing *Joyner* v. *King*, 786 F.2d 1317, 1320 (5th Cir. 1986)), the claim is exhausted because "the supplemental evidence . . . [does] not fundamentally alter the legal claim already considered by the state courts, and, therefore, [does] not require that [Conner] be remitted to state court for consideration of that evidence." *Vasquez*, 474 U.S. at 260.

477 F.3d at 292 (brackets & ellipsis in *Conner*).

In short, there is confusion over the test for factual exhaustion. This Court should dispel that confusion, and should do so with an eye to other habeas-procedure issues. In particular, "the 'exhaustion' and 'adjudicated on the merits' elements of federal habeas practice are mirror images." *Wilson* v. *Workman*, 577 F.3d 1284, 1292 (10th Cir. 2009) (en banc) (McConnell, J). Thus, if a court disposes of a claim without considering the facts that support it, the court has not decided the claim on its merits. *Id.* at 1290–91. That is why the Tenth Circuit recently held that if new facts generate a new claim in federal court, then AEDPA deference does not apply to that claim, and federal review of it is *de novo*. *Id.* at 1293; *cf. Bell* v. *Kelly*, *cert. granted*, 128 S. Ct. 2108 (2008), *cert. dismissed*, 129 S. Ct. 393 (2008).

II.

In Raising Procedural Defenses *Sua Sponte*, The Court of Appeals Acted Fundamentally Unfairly and Took Sides in Two Circuit Splits That This Court Should Resolve.

Even if Ms. Bason had a new claim, it should have been considered below, because the State expressly waived exhaustion. Yet the court of appeals raised two procedural defenses *sua sponte*, without giving Ms. Bason notice or an opportunity to be heard on them. In so doing, the Sixth Circuit departed so far from the usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. Such an exercise, furthermore, would be doctrinally useful. Exhaustion and procedural default are "inseparab[le]," *Edwards* v. *Carpenter*, 529 U.S. 446, 452 (2000), but this Court has not yet resolved how they interact after a State has waived exhaustion under AEDPA.

A. Most Circuits Hold That Waiving Exhaustion Also Waives Any Exhaustion-Related Default.

The exhaustion rule is nonjurisdictional. *Day* v. *McDonough*, 547 U.S. 198, 205 (2006). So it need not apply if a State waives it expressly, through counsel. 28 U.S.C. § 2254(b)(3). Here, the State of Michigan did just that. When asked, "Have remedies been exhausted?" the State literally checked the "Yes" box. State Br. at ii (fact sheet); *see Baker* v. *Craven*, 82 F. App'x 423, 428

n.3 (6th Cir. 2003) (unpublished) (declining to address exhaustion after identical stipulation).

As for defaults, the Eleventh Circuit has explained that there are two types of procedurally defaulted claims: unexhausted claims that are time-barred under State law, and claims that have been argued before State courts and disposed of on procedural grounds. Accordingly, if a State waives exhaustion under § 2254(b)(3), the State also waives procedural default. *Smith* v. *Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1339–40 (11th Cir. 2009) (citing *McNair* v. *Campbell*, 416 F.3d 1291, 1306 (11th Cir. 2005)).

The First and Tenth Circuits agree with this analysis. *Pike* v. *Guarino*, 492 F.3d 61, 73 (1st Cir. 2007) ("[I]n expressly waiving the nonexhaustion defense, the Commonwealth lost the concomitant right, in the procedural default context, to assert that the claim was not presented to the state courts."); *see also Gonzalez* v. *McKune*, 279 F.3d 922, 924 (10th Cir. 2002) (en banc) (noting that the state did not waive procedural default, since it did not expressly waive nonexhaustion). In the Fifth Circuit, defaults caused by nonexhaustion are waived by an express waiver of nonexhaustion, *Bledsue* v. *Johnson*, 188 F.3d 250, 254–55 (5th Cir. 1999), but other defaults are not, *see Jackson* v. *Johnson*, 194 F.3d 641, 652 & n.35 (5th Cir. 1999); *see also Perruquet* v. *Briley*, 390 F.3d 505, 515–16 (7th Cir. 2004) (comparing cases).

Other courts, however, disagree. *Franklin* v. *Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002);

Robinson v. *Crist*, 278 F.3d 862, 865 (8th Cir. 2002) ("[A]n exhaustion concession does not necessarily constitute a procedural default waiver. . . .").

Here, without analyzing the matter, the Sixth Circuit took the minority view. Elsewhere, its position is unclear. *See Garner* v. *Mitchell*, 502 F.3d 394, 401 n.1 (6th Cir. 2007) (distinguishing waiver of default from waiver of exhaustion), *rev'd on other grounds*, *Garner* v. *Mitchell*, 557 F.3d 257, 260 (6th Cir. 2009) (en banc) (denying petitioner's claim on merits despite lack of exhaustion); *see also id.* at 271 (Daughtrey, J., concurring in result) (terming exhaustion-related default "dispositive").

Even if a court may raise default *sua sponte*, it would be highly improper to do so after a State expressly waives default. It is one thing for a court to act *sua sponte* in the face of silence; it is quite another for a court to invoke a defense that a State has expressly declined to deploy. *Cf. Day*, 547 U.S. at 202 ("[W]e would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense.").

B. Most Circuits Hold That Courts Should Not Invoke Procedural Defenses *Sua Sponte* Without Giving Petitioners Notice and an Opportunity To Be Heard.

Even where default exists, a petitioner is normally "under no obligation to address the default until the State raise[s] the issue. . . ." *Fairchild* v. *Workman*, 579 F.3d 1134, 1141 n.2 (10th Cir. 2009) (internal citation omitted). Here,

after waiving exhaustion, the State never argued default. Surely its experienced habeas counsel knew that default is "normally a defense that the State is obligated to raise and preserve if it is not to lose the right to assert the defense thereafter." *Trest* v. *Cain*, 522 U.S. 87, 89 (1997) (internal quotation marks, citation, and alterations omitted).

Default is not jurisdictional, so courts need not raise it *sua sponte*. *Id.* Whether courts *may* raise default *sua sponte* is a question that this Court has reserved. *Id.* at 90–91; *see also Day*, 547 U.S. at 206 & n.5. The courts of appeals generally hold that they do have this power. *Id.* at 206–07 (collecting cases).[5]

Sua sponte action, however, requires care. In the limitations context, this Court has warned, "[B]efore acting on its own initiative, a court must

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[5] The counterargument is that States may logically decide that federal questions should be litigated in federal courts; and that in the interests of comity and federalism, federal courts should respect sovereigns' decisions to proceed on the merits. *See Hills* v. *Washington*, 441 F.3d 1374, 1376–77 (11th Cir. 2006) (per curiam) (refusing to consider procedural default when the State defended only on the merits). Furthermore, equity between the parties suggests that States, like other litigants, should be held to their strategies. *See Rosario* v. *United States*, 164 F.3d 729, 733 (2d Cir. 1998) ("[P]risoners seeking habeas corpus relief lack the resources available to the government. We should hesitate to lend the weight of the judiciary to this already uneven fight."). Equal treatment of opposing parties would "observe[ ] the formalities of our adversary system, which is a nontrivial value in itself." *Day*, 547 U.S. at 216 n.2 (Scalia, J., dissenting).

accord the parties fair notice and an opportunity to present their positions. Further, the court must assure itself that the petitioner is not significantly prejudiced by the delayed focus" on the issue. *Day* 547 U.S. at 210; *see also id.* at 205 (analogizing statutes of limitations to both exhaustion and procedural default).

For these reasons, five circuits—including the Sixth—hold that it is inappropriate to raise default *sua sponte* if the petitioner has had no notice that default will be at issue, and no opportunity to be heard on the subject. *Prieto* v. *Quarterman*, 456 F.3d 511, 518–19 (5th Cir. 2006); *Howard* v. *Bouchard*, 405 F.3d 459, 476–77 (6th Cir. 2005); *Hale* v. *Gibson*, 227 F.3d 1298, 1334 n.16 (10th Cir. 2000); *Roach* v. *Angelone*, 176 F.3d 210, 215 n.3 (4th Cir. 1999); *Esslinger* v. *Davis*, 44 F.3d 1515, 1528 (11th Cir. 1995). "[F]or a court sua sponte to invoke a procedural default without giving the petitioner an opportunity to show cause" is "fundamentally unfair." *Esslinger*, 44 F.3d at 1528. As a matter of due process, a petitioner "must receive notice of the court's intention to interpose default, and opportunity to demonstrate 'cause' for the default and 'prejudice,' and, if material issues of fact are present, an opportunity to present . . . evidence." *Id.* at 1528 n.45.

There are circuits, however, that do not require notice and an opportunity to be heard before raising procedural default *sua sponte* and dismissing on that basis. In *Rosario* v. *United States*, 164 F.3d 729, 732–33 (2d Cir. 1998), the

Second Circuit raised procedural default *sua sponte* in a § 2255 case, without any briefing on the subject, and without addressing the fact that the petitioner had no opportunity to be heard on it.[6] In the AEDPA statute-of-limitations context, the Second Circuit similarly allows *sua sponte* dismissals, without opportunity to be heard, where the time bar is "unmistakably clear from the facts alleged in the petition." *Acosta* v. *Artuz*, 221 F.3d 117, 125 (2d Cir. 2000). The Seventh Circuit too seems not to have any notice rule. *See Kurzawa* v. *Jordan*, 146 F.3d 435, 440 (7th Cir. 1998) ("If the State does not explicitly or implicitly forego the waiver defense, we may make sua sponte inquiry into whether a procedural default is manifest.") (internal quotation marks and citation omitted). The *Kurzawa* court refused to consider arguments that it considered inadequately raised in State court, even though the district court considered exhaustion and then heard the case on the merits. *Kurzawa* is silent as to whether the circuit court received briefing or heard argument on notice and opportunity. *Id.* at 440–43 & n.5.

There was no briefing or argument here on default. The panel raised it *sua sponte*—despite having observed, in a case from the same sitting, that the Sixth Circuit "does not do so as a matter of

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[6] The Ninth Circuit has rejected the *Rosario* approach, at least in § 2255 cases. *United States* v. *Guess*, 203 F.3d 1143, 1146 n.2 (9th Cir. 2000) (citing *United States* v. *Barron*, 172 F.3d 1153 (9th Cir. 1999) (en banc)).

course." *Cristini* v. *McKee*, 526 F.3d 888, 898 (6th Cir. 2008) (internal quotation marks omitted).

C. If Ms. Bason Had Been Given Notice, She Could Have Made Three Points.

The fundamental unfairness of the result below is even more acute given that, one year after oral argument, Ms. Bason offered to provide the court of appeals "further briefing on any subject." Indeed, had the court below given notice, Ms. Bason could have countered any procedural defenses, which the State had expressly waived, with at least three arguments.

1. There Was No Default.

First, Ms. Bason could have argued that no aspect of her claim is defaulted. In *Wagner* v. *Smith*, 581 F.3d 410 (6th Cir. 2009), a Michigan prisoner made ineffective-assistance arguments on direct State appeal, and—like Ms. Bason—never made any State collateral attack. After finding that some federal arguments were unexhausted claims, the Sixth Circuit remanded the petition as mixed, and observed that under Michigan law, "there is no statutory time limit" on the first collateral attack. *Id.* at 419. Michigan courts may hear unexhausted claims if the petitioner shows cause and prejudice for not raising them on direct appeal. *Id.*

2. Any Default Should Be Excused Due to Cause and Prejudice.

Second, even if there were a default, Ms. Bason could have argued that it should be

excused. While this Court has "not identified . . . exactly what constitutes 'cause' to excuse a procedural default," it has acknowledged that "in certain circumstances counsel's ineffectiveness in failing to properly preserve the claim for review in state court will suffice." *Edwards* v. *Carpenter*, 529 U.S. 446, 451 (2000). Cause "may include . . . ineffective assistance of counsel—in the constitutional sense—on direct appeal." *Matchett* v. *Dretke*, 380 F.3d 844, 848–49 (5th Cir. 2004) (citing *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986)). Here, cause and prejudice are both present because Ms. Bason's State appellate counsel failed to raise Barnwell's failure to put the Van Horn report in.

3.. If Ms. Bason's Petition Were Mixed, Then Staying and Abeyance Would Be Proper.

Third, Ms. Bason could have sought to return to State court and exhaust the report issue, and have asked that meanwhile, her federal petition be stayed and held in abeyance. That very procedure is what this Court has approved in order to harmonize the total-exhaustion rule of *Rose* v. *Lundy*, 455 U.S. 509 (1982), with AEDPA's statute of limitations in a way that does not risk petitioners "forever losing their opportunity for any federal review of their unexhausted claims," *Rhines* v. *Weber*, 544 U.S. 269, 275 (2005). The *Rhines* procedure is "appropriate when the district court determines there was good cause for the petitioner's failure to exhaust." *Id.* at 277. It is not available if the unexhausted claims are "plainly

meritless," *id.*, or if the petitioner engages in "abusive litigation tactics or intentional delay," *id.* at 278. Importantly, good cause can include "reasonable confusion," at least as to the timeliness of a filing. *Pace* v. *DiGuglielmo*, 544 U.S. 408, 416 (2005); *see also Rhines*, 544 at 279 (Stevens, J., concurring) ("[G]ood cause . . . is not intended to impose the sort of strict and inflexible requirement that would trap the unwary pro se prisoner.") (internal quotation marks omitted).

Here, even if Ms. Bason's petition were mixed, it would be suited to staying and abeyance. The parties' agreement that Ms. Bason's claim was exhausted shows that she has proceeded reasonably. So too does the fact that the Sixth Circuit has often followed this Court's factual-exhaustion precedent of *Vasquez*. *See* Part I.A, *supra*. The "new" but transcript-based argument, from counsel's failure to put in the report, is meritorious. *See* Part III.A.2, *infra*. And Ms. Bason is serving a term of years. She has no incentive to delay. In such circumstances, other circuits have remanded claims for further consideration by district courts. *See, e.g.*, *Fairchild*, 579 F.3d at 1155.

III.

The Decision Below Is Incorrect.

Regardless of whether the Sixth Circuit was correct to ignore half of Ms. Bason's arguments, it still misjudged her appeal, for at least four reasons.

A. The State Court Unreasonably Applied Clearly Established Federal Law.

1. A Substantial-Defense Test Conflicts with *Strickland*.

The Michigan Court of Appeals held that Ms. Bason had not established that her "defenses were substantial such that they might have made a difference in the outcome of the trial." App. 38a. But the issue is whether the defendant "received a fair trial . . . resulting in a verdict worthy of confidence." *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995). That is why the *Strickland* prejudice test requires only a "reasonable probability" of a different trial result. *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984).

To use a substantial-defense test, therefore, is contrary to *Strickland*:

> The Michigan Court of Appeals' focus on whether the petitioner was deprived of a substantial defense borders on an outcome-determinative test specifically rejected by the Supreme Court in *Strickland*. . . . To require the petitioner to show counsel's performance deprived him of a defense to the charges borders on requiring him to show that the outcome . . . would have been different; such a result is contrary to Supreme Court precedent.

Smith v. *Lafler*, 175 F. App'x 1, 6 n.1 (6th Cir. 2006) (unpublished) (citation omitted).

2. To Be Strategic Under *Wiggins*, Counsel's Decision Must Not Rest on a Rotten Foundation.

To be a strategy, a choice must be a "conscious, reasonably informed decision made by an attorney with an eye to benefiting [the] client." *Pavel* v. *Hollins*, 261 F.3d 210, 218 (2d Cir. 2001); *see also id.* at 218 n.11 (collecting cases). By contrast, if a decision is not freely made, but rather is dictated by prior errors, then counsel is "not in a position to make a reasonable strategic choice." *Wiggins* v. *Smith*, 539 U.S. 510, 536 (2003).

Therefore, if counsel's mistake causes a defense theory to be abandoned, the abandonment is not strategy. *See Rolan* v. *Vaughn*, 445 F.3d 671, 682 (3d Cir. 2006) (failure to investigate); *United States* v. *Span*, 75 F.3d 1383, 1389–90 (9th Cir. 1996) (self-defense); *Chambers* v. *Armontrout*, 907 F.2d 825, 831 (8th Cir. 1990) (failure to investigate self-defense witness). If counsel, in an "oversight," fails to obtain an expert report, and can provide "no explanation that could justify" this, then counsel is ineffective. *Harris* v. *Cotton*, 365 F.3d 552, 555–56 (7th Cir. 2004). In the Sixth Circuit itself, if counsel flouts a rule requiring advance disclosure of a witness, counsel acts unprofessionally. *Stewart* v. *Wolfenbarger*, 468 F.3d 338, 355 (6th Cir. 2006). "[T]here is nothing reasonable about failing to file an alibi notice within the time prescribed by the applicable rules when such failure risks wholesale exclusion of the defense." *Clinkscale* v. *Carter*, 375 F.3d 430, 443 (6th Cir. 2004).

B. The State Court Unreasonably Determined the Facts.

1. There Was No Accident Theory.

The Michigan court's finding that Barnwell made a strategic decision to proceed on an accident theory is—as this Court described similarly self-serving testimony—"more a post hoc rationalization of counsel's conduct than an accurate description of [her] deliberations. . . ." *Wiggins*, 539 U.S. at 526–27. Indeed, the word "accident" never appeared in Barnwell's opening or closing statement. Rather, the thrust of the opening statement was that Ms. Bason had defenses to offer: provocation, self-defense, or mental illness. The gist of the terse closing statement was that the prosecution had failed to meet its burden of proof.

Barnwell's post-hoc testimony was equally troubling. She rationalized, "It had to have been an accident because she loved him very much." JA 1229. But a battered woman can be a loving wife. *See generally People* v. *Wilson*, 487 N.W.2d 822, 824 (Mich. App. 1992) (discussing loving behaviors between batterers and women). And a heat-of-passion defense is strengthened, not undercut, by the killer's passion for the victim. *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 15.2(b) (2d ed. 2009) (including adultery among provocations that have "traditionally been considered, almost as a matter of law, to be reasonable"); *accord* 4 WILLIAM BLACKSTONE, COMMENTARIES *191–92 ("[T]here could not be a greater provocation.").

2. There Was No Cooling-Off Time.

Indeed, what sparked the crash here was not Mr. Branch's earlier phone call to another woman. Rather, as a prosecutor said, it was that Ms. Bason "caught [her husband] on the block of his girlfriend." Indeed, with each step that her husband took toward the place where he would meet Wynter White, Ms. Bason's heat of passion increased. What spouse would remain emotionally unexcited as the beloved walks to an adulterous rendezvous?

CONCLUSION

Lanise Bason's petition for a writ of certiorari should be granted.

Respectfully submitted,

Mark U. Schneiderman
Matthew Lippert
125 Broad St., 32d Fl.
New York, NY 10004
(212) 558-4000

Jeremy C. Bates
Counsel of Record
21 West St. Apt. 21J
New York, NY 10006
(212) 204-6599

Attorneys for Petitioner Lanise Bason

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